Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	
Expanding the Reach and Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

COMMENTS OF
LOCAL GOVERNMENT LAWYERS ROUNDTABLE

I. INTRODUCTION

The Local Government Lawyers Roundtable ("LGL") files these Comments in response to the Notice of Inquiry ("NOI"), released April 7, 2011, in the above-entitled matter. LGL is a not-for-profit corporation which assists local government lawyers in their day to day legal practices by staying abreast of federal law developments on a variety of issues.

The Notice of Inquiry ("NOI") states that it "concerns key challenges and best practices in expanding the reach and reducing the cost of broadband deployment *by improving government policies for access to rights of way and wireless facilities siting.*"[1] This sentence mimics the NOI's title and suggests that the Commission already reached the conclusion that changes in right of way policies will expand the reach, and reduce the cost of, broadband deployment. The Commission reached this foundational conclusion before any inquiry or analysis of facts related to broadband deployment has taken place. The NOI further states and assumes that

> By working together on [rights of way policies and wireless facilities siting requirements], we can reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in

[1] NOI ¶1.

infrastructure, increase efficient use of scare public resources (including spectrum) and increase broadband adoption.[2]

The title and opening paragraphs of the NOI make clear the Commission assumes that right of way regulation throughout the United States, in local governments small and large, is a significant impediment to the deployment of broadband to citizens of the United States and it begins its inquiry from this predetermined point. Citing the National Broadband Plan, the Commission also states that the rates, terms, and conditions for access to rights of way significantly impact broadband deployment as though this were proven fact.[3] The Commission is mistaken on all counts.

In fact, the data contained in the National Broadband Map ("NBM") shows that there is no correlation between rights of way regulation and broadband deployment. According to NBM data, 100 % of the population of 22 states and the District of Columbia has access to at least one broadband provider.[4] If the Commission's jumping off point were correct, one would expect that these 22 states and the District of Columbia would have the least amount of right of way regulation. But this is not so. For instance, Oregon is one of the states within that grouping of 22 states. Local governments within Oregon have the ability to charge up to 7% of gross revenues in the form of fees and charges for the use of the public right of way,[5] and yet 100% of its population has access to broadband services, with more than 95% of its population having access to at least 1 wireline provider and more than 99% of its population has access to at least 1 wireless provider. Arkansas is also among the group of states with 100% accessibility for its

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[2] NOI at ¶2.

[3] NOI at ¶7.

[4] *See* Attachment A, Analysis of State by State Broadband Deployment.

[5] Or. Rev. Stat. §221.515 (1999).

population. It allows local franchise fees up to 4.25% for the right to occupy public property.[6] Other states with coverage for 100% of their population also allow for a variety of compensation mechanisms for access to the public rights of way.

Additionally, if the Commission's jumping off point were correct, one might also expect that Alaska, which limits right-of-way charges to the "actual cost to the municipality of the utility's use of the public way and of administering the permit program,"[7] would have extensive deployment of broadband services. It does not. In fact, it and West Virginia have the lowest percentage of population with access to one or more broadband providers.[8] While population centers such as Anchorage, Fairbanks, and Juneau have broadband coverage for 99% of their population, six counties in Alaska do not even have one broadband provider, whether wireline or wireless.[9] In addition, another 7 counties have broadband available to only 50% or less of their population. Something else is driving the deployment, but what? That is the question the Commission should be investigating.

None of this is meant to suggest that only states in which local governments regulate and seek compensation for the use of the rights of way have experienced significant deployment. That would be a fallacy, as Colorado, which limits local governments to seeking cost based compensation,[10] has also experienced coverage for 100% of its population by at least one broadband provider.[11] Rather, the point of this exercise is to remind the Commission that other

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[6] Ark. Code Anno. §14-200-101(a)(1)(A) (2002).

[7] Alaska Stat. § 42.05.251 (2002).

[8] Puerto Rico and American Samoa have even lower percentages of their populations with access to broadband services. *See*, Attachment A.

[9] *See* Attachment B, Analysis of Alaska Broadband Deployment.

[10] Colo. Rev. Stat. §38-5.5-107(1)(b)(2002).

[11] *See* Attachment A.

factors determine the extent of deployment and that there is no decrease in deployment as a result of local government right of way practices. While it may be easiest to prescribe a "fix" for local government practices, such a fix will not address the real problems behind the lack of deployment to certain populations and areas. If the Commission were to review the data collected and disseminated through the NBM, it would see that its beginning premise is faulty and it could begin the difficult process of fashioning a real solution to the problem reaching all Americans with broadband services. LGL requests that the Commission take the time to review its data and act accordingly.

II. TIMELINESS AND COMPENSATION ISSUES

Neither the timeliness of the permitting process nor the compensation sought for the use of public rights of way serve as an impediment to broadband deployment. According to the NBM data, 79 % of the American population has access 2 or wireline broadband providers, while an additional 15.3% have access to at least1 wireline broadband provider. In total, 94.3% of the United States population has access to at least 1 wireline broadband service provider. In addition, only 1.5% of the national population does not have access to even 1 wireless provider. [12] It seems unlikely that the permitting process presents a significant impediment in the deployment process.

Certainly, a country as technologically and innovatively rich as the United States should be able to deploy broadband capabilities to all its citizens. However, it seems unlikely that we would have this extent of deployment if the permitting processes of the Nation's more than 35,000 cities, towns, and villages, and more than 3,000 counties, were causing any delay, much less significant impediments to deployment. Broadband providers have not presented concrete data that even 1% (approximately 380) of the Nation's local governments have engaged in

[12] *See* Attachment C, Native Nations Analysis including nationwide population statistics.

dilatory conduct. The anecdotal information they provide might be sufficient to conduct individual investigations and fashion individual remedies, but it certainly does not justify a national "solution" by the Commission. The Commission should resist the impulse to take control of local government right of way policies and procedures absent compelling evidence that a significant impediment actually exists.

With respect to compensation, the text of § 253 of the Telecommunications Act of 1996 provides that local governments may require compensation for the use of their rights of way. While Congress left the word "compensation" undefined, the Commission is not at liberty to create a limiting definition for the term. As the Commission is well aware, a fair reading of the legislative history reveals Congress intended local governments to be able to do more than recoup direct costs from private profit-seeking corporations.

The legislative history supports this contention. Debates involving Section 253 and its precursor demonstrate that local governments may receive payments akin rent for the use of public property by private corporations providing telecommunications and information services.

For instance, during the August 1995 debates on the Act, while discussing his amendment to allow for differing treatment among telecommunications providers, Representative Stupak stated: "In our free market society, the companies should have to pay a fair and reasonable rate to use public property."[13] Representative Barton went on to state "that cities and local governments *have the right* to not only control access within their city limits, but also *to set the compensation level for the use of that right-of-way.*"[14]

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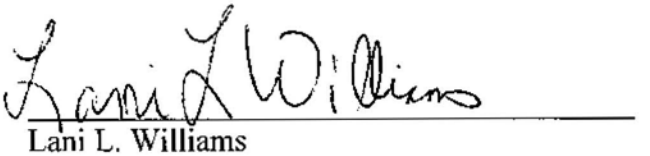
[13] 141 Cong. Rec. H8460-01(daily ed. Aug. 4, 1995) (statement of Representative Stupak).

[14] *Id.* (emphasis added).

Other members of Congress echoed these sentiments as the Telecommunications Act of 1996 was debated. Had Congress meant to allow only the recovery of costs, Congress could easily have provided for that result. By using the broad term "compensation," Congress allowed local governments to fashion mechanisms which are appropriate to each particular jurisdiction, whether that be pure cost recovery or protection of the public trust in which they hold property through the requirement of compensation akin to rent. The Commission should refrain from replacing congressional decision-making with its own wisdom.

In conclusion, the Commission should carefully review the evidence already at its disposal and should refrain from limiting the powers of local governments with respect to right of way management.

Respectfully submitted,



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COMMENTS OF LOCAL GOVERNMENT LAWYERS ROUNDTABLE

ATTACHMENT A

National Broadband Map
How connected is my community?

Analyze » Rank

Rank » State » Within Nation
Metric» Number Of Any Service Providers Greater Than 1

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nbm.gov/g8P3

Below are rankings for the requested broadband characteristics. The broadband data below is as of 06/30/10 and represents data collected by SBDD grantees.

Rank	Name	Provider Any no>1	Provider Wireline no>1	Provider Wireless no>1	Speed Combo DL>3 UL>0.7	Demographics Educ. Ba/Bsc/+	Demographics Income <25k	Demographics Income Median
1	Georgia	100%	95.6%	99.9%	99.1%	27.1%	24.7%	51,111
2	New Jersey	100%	99.6%	100%	100%	34.1%	17.3%	70,233
3	Arizona	100%	91.4%	98.5%	96.3%	25.6%	22.8%	50,743
4	Massachusetts	100%	99.1%	99.8%	99.8%	37.6%	20.2%	65,235
5	Missouri	100%	89.1%	97.4%	95.6%	24.6%	26.4%	46,971
6	Maryland	100%	98.0%	99.5%	99.3%	35.0%	15.4%	71,338
7	Oregon	100%	95.5%	99.4%	98.4%	28.2%	24.3%	49,652
8	Connecticut	100%	99.3%	100%	99.9%	35.1%	17.7%	68,427
9	Arkansas	100%	87.7%	99.4%	85.5%	19.1%	32.6%	39,083
10	Utah	100%	97.1%	99.4%	97.8%	29.0%	17.6%	56,082
11	Maine	100%	94.3%	99.7%	98.6%	26.1%	26.3%	46,856
12	Rhode Island	100%	99.7%	100%	99.8%	29.7%	23.4%	55,825
13	Montana	100%	92.9%	96.0%	94.1%	27.3%	28.1%	43,412
14	Delaware	100%	98.6%	100%	100%	27.5%	19.3%	58,318
15	Vermont	100%	93.9%	96.3%	95.7%	33.1%	22.9%	51,577
16	District Of Columbia	100%	99.9%	100%	100%	47.1%	24.4%	56,519
17	Florida	100%	97.1%	99.9%	99.7%	25.6%	24.7%	47,703
18	New York	100%	98.5%	99.7%	99.6%	31.5%	23.7%	57,980
19	Michigan	100%	94.0%	99.9%	99.1%	24.7%	24.9%	49,726
20	Colorado	100%	95.1%	99.8%	99.3%	35.3%	20.8%	57,096
21	Iowa	100%	94.6%	98.7%	96.7%	24.6%	24.1%	48,626
22	Wisconsin	100%	90.1%	99.8%	88.2%	25.6%	22.1%	52,337
23	North Dakota	100%	89.1%	99.7%	98.7%	26.0%	27.0%	45,406
24	Hawaii	99.9%	97.5%	99.9%	97.5%	29.2%	17.0%	64,756
25	California	99.9%	95.7%	99.8%	91.7%	29.1%	20.0%	61,261
26	Illinois	99.9%	96.6%	99.8%	99.3%	29.9%	21.8%	56,550
27	Tennessee	99.9%	93.7%	99.6%	98.7%	22.8%	29.1%	43,857
28	South Carolina	99.9%	92.2%	99.8%	98.9%	23.5%	28.7%	43,909
29	Washington	99.9%	95.6%	99.7%	99.2%	30.4%	20.2%	57,293
30	Kansas	99.9%	93.0%	99.0%	99.3%	29.2%	23.9%	50,216
31	Minnesota	99.9%	95.6%	99.3%	98.5%	31.1%	19.6%	58,198
32	Texas	99.8%	92.3%	99.5%	99.0%	25.4%	25.4%	49,599
33	Pennsylvania	99.8%	97.3%	98.7%	99.4%	26.1%	24.6%	51,367

Rank	Name	Provider Any no>1	Provider Wireline no>1	Provider Wireless no>1	Speed Combo DL>3 UL>0.7		Demographics Educ. Ba/Bsc/+	Demographics Income <25k	Demographics Income Median
34	Ohio	99.8%	96.9%	99.5%	99.3%	±0.0	23.6%	25.8%	47,773
35	Nevada	99.8%	97.1%	99.5%	99.4%	±0.0	21.4%	18.9%	55,540
36	Nebraska	99.8%	87.3%	98.8%	97.9%	±0.0	27.4%	24.4%	48,439
37	South Dakota	99.8%	93.7%	99.3%	98.5%	±0.0	24.7%	26.3%	45,374
38	North Carolina	99.8%	95.7%	98.8%	98.5%	±0.0	26.1%	27.2%	46,106
39	New Hampshire	99.7%	96.7%	99.6%	98.6%	±0.0	32.5%	17.0%	63,753
40	Indiana	99.7%	98.3%	97.0%	71.6%	±0.0	22.2%	24.6%	48,261
41	Oklahoma	99.5%	84.0%	98.3%	90.0%	±0.0	22.5%	29.5%	42,210
42	Alabama	99.4%	87.9%	98.6%	86.2%	±0.0	21.8%	31.4%	42,008
43	Louisiana	99.4%	94.6%	95.3%	96.4%	±0.0	20.9%	31.2%	42,721
44	Kentucky	99.3%	85.7%	97.6%	87.8%	±0.0	20.2%	31.6%	41,762
45	Idaho	99.2%	87.6%	98.1%	85.3%	±0.0	23.7%	24.5%	46,643
46	Wyoming	99.2%	83.1%	97.7%	53.5%	±0.0	23.2%	21.0%	52,729
47	Mississippi	98.5%	83.3%	96.8%	93.8%	±0.0	19.3%	35.3%	37,857
48	New Mexico	98.4%	87.2%	96.4%	94.5%	±0.0	24.9%	29.3%	43,646
49	Virginia	98.3%	94.1%	91.6%	93.6%	±0.0	33.5%	19.0%	65,171
50	Virgin Islands Of The United States	96.8%	83.4%	96.7%	0.0%	±0.0	16.7%	26.8%	24,507
51	Alaska	90.6%	83.2%	83.7%	77.8%	±0.0	26.3%	15.8%	65,488
52	West Virginia	90.5%	76.8%	79.2%	78.4%	±0.0	17.3%	34.3%	38,107
53	Puerto Rico	71.5%	55.0%	70.6%	46.5%	±0.0	17.3%	66.5%	16,346
54	American Samoa	30.2%	8.9%	29.6%	17.6%	±0.1	5.2%	61.7%	15,127

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The **National Broadband Map** is a tool to search, analyze and map broadband availability across the United States.
Created and maintained by the **NTIA**, in collaboration with the **FCC**, and in partnership with 50 states, five territories and the District of Columbia.

COMMENTS OF LOCAL GOVERNMENT LAWYERS ROUNDTABLE

ATTACHMENT B

National Broadband Map
How connected is my community?

Analyze » Rank

Rank » County » Within Alaska
Metric» Number Of Any Service Providers Greater Than 1

Below are rankings for the requested broadband characteristics. The broadband data below is as of 06/30/10 and represents data collected by SBDD grantees.

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Rank	Name	Provider Any no>1	Add Metric	Add Metric	Add Metric	Add Metric	Add Metric	Add Metric
1	Fairbanks North Star, AK	100%	%	%	%	%	%	%
2	Juneau, AK	100%	%	%	%	%	%	%
3	Denali, AK	99.9%	%	%	%	%	%	%
4	Ketchikan Gateway, AK	99.8%	%	%	%	%	%	%
5	Matanuska Susitna, AK	99.8%	%	%	%	%	%	%
6	Sitka, AK	99.6%	%	%	%	%	%	%
7	Anchorage, AK	99.3%	%	%	%	%	%	%
8	Haines, AK	96.9%	%	%	%	%	%	%
9	Kenai Peninsula, AK	96.3%	%	%	%	%	%	%
10	Valdez Cordova, AK	92.7%	%	%	%	%	%	%
11	Kodiak Island, AK	88.5%	%	%	%	%	%	%
12	Prince Of Wales Outer Ketchikan Census Area, AK	86.0%	%	%	%	%	%	%
13	Wrangell Petersburg Census Area, AK	84.4%	%	%	%	%	%	%
14	North Slope, AK	64.9%	%	%	%	%	%	%
15	Skagway Hoonah Angoon Census Area, AK	50.9%	%	%	%	%	%	%
16	Northwest Arctic, AK	45.3%	%	%	%	%	%	%
17	Southeast Fairbanks, AK	39.4%	%	%	%	%	%	%
18	Bethel, AK	38.2%	%	%	%	%	%	%
19	Nome, AK	36.9%	%	%	%	%	%	%
20	Yukon Koyukuk, AK	18.5%	%	%	%	%	%	%
21	Aleutians West, AK	6.8%	%	%	%	%	%	%
22	Wade Hampton, AK	0.0%	%	%	%	%	%	%
23	Dillingham, AK	0.0%	%	%	%	%	%	%
24	Aleutians East, AK	0.0%	%	%	%	%	%	%
25	Lake And Peninsula, AK	0.0%	%	%	%	%	%	%
26	Bristol Bay, AK	0.0%	%	%	%	%	%	%
27	Yakutat, AK	0.0%	%	%	%	%	%	%

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COMMENTS OF LOCAL GOVERNMENT LAWYERS ROUNDTABLE

ATTACHMENT C

National Broadband Map
How connected is my community?

Analyze » Summarize

Native Nations » Fort Bidwell

Below is a summary of the broadband characteristics for the area listed above. The broadband data below is as of June 30, 2010 and represents data collected by SBDD grantees. Click on the section headings to see more information.

Print this page • Export Data

Number of Wireline Providers	Percent Population	Nationwide
0	94.7%	5.8%
1	5.3%	15.3%
2	0.0%	47.7%
3	0.0%	21.5%
4	0.0%	7.8%
5	0.0%	1.2%
6	0.0%	0.4%
7	0.0%	0.3%
8+	0.0%	0.1%

Source API Call

Number of Wireless Providers	Percent Population	Nationwide
0	0.0%	1.5%
1	100.0%	5.8%
2	0.0%	10.6%
3	0.0%	15.2%
4	0.0%	27.6%
5	0.0%	18.3%
6	0.0%	11.6%
7	0.0%	4.3%
8+	0.0%	5.0%

Source API Call

Technology	Percent Population	Nationwide
DSL	5.3%	86.6%
Fiber	0.0%	14.5%
Cable	0.0%	82.2%
Wireless	89.7%	96.9%
Other	0.0%	1.5%

Source API Call

Speed	Percent Population	Nationwide
Unreported	0.0%	0.6%
Download > 0.768 Mbps, Upload > 0.2 Mbps	89.7%	98.3%
Download > 3 Mbps, Upload > 0.768 Mbps	0.0%	95.5%

Source API Call

Community Anchor Institutions	Total Number of Records	Subscribe to Broadband: Yes	No	?	*	Download Speed
Schools K through 12						
University, College, other post-secondary						
Libraries						
Medical / Healthcare						
Public Safety						
Community Centers - Government support						
Community Centers - Non-Government support						

Source API Call Speeds provided *

BTOP Nationwide Funding Summary

Funding Type	Recipients and Projects	Total Award
State Data and Development	56 Total Recipients, 56 Total Projects	$292,820,018
Infrastructure	112 Total Recipients, 121 Total Projects	$3,484,813,380
Sustainable Adoption	64 Total Recipients, 65 Total Projects	$200,504,996
Public Computer Centers	44 Total Recipients, 45 Total Projects	$251,199,099

Source API Call

BIP Nationwide Funding Summary

Applicants	Grant Request	Loan Request	Total Request
Round 1			
58 Total Applicants	$542,135,078	$418,055,861	$960,190,939
Round 2			
200 Total Applicants	$1,791,727,031	$773,788,717	$2,565,515,748
TA-Grants			
19 Total Applicants	$21,225,640,526	$0	$21,225,640,526

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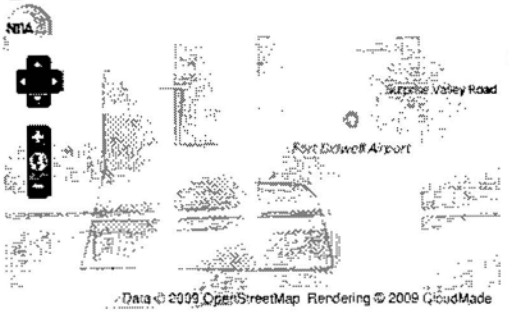

Demographics

Total area (sq miles)	23
Population	189
Households	71

Age	Area (%)	Nationwide

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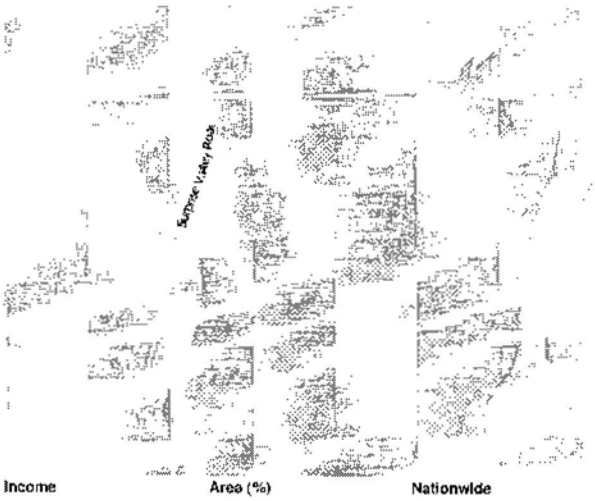
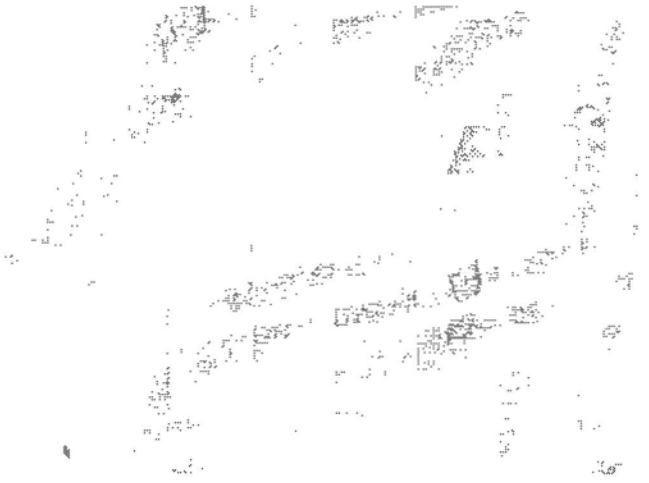
The National Broadband Map is a tool to search, analyze and map broadband availability across the United States.
Created and maintained by the NTIA, in collaboration with the FCC, and in partnership with 50 states, five territories and the District of Columbia.





Income	Area (%)	Nationwide
Median income	$34,007	$52,718
Poverty rate	15.8%	13.9%
Below $25k	37.0%	24.3%
$25k-$50k	29.2%	24.9%
$50k-$100k	22.1%	30.7%
$100k-$200k	11.0%	16.1%
$200k or more	0.7%	4.0%

Education	Area (%)	Nationwide
High School graduate	85.5%	84.2%
Bachelor's degree or higher	14.4%	27.3%

Source: API Call

Map »

Map my community

Rank

Rank my community

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Diving Deeper into the Data
posted by Eric Spry on May 27, 2011

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